

1 BART H. WILLIAMS (State Bar No. 134009)
2 bart.williams@mto.com
3 MANUEL F. CACHÁN (State Bar No. 216987)
4 manuel.cachan@mto.com
5 MUNGER, TOLLES & OLSON LLP
6 355 South Grand Avenue
7 Thirty-Fifth Floor
8 Los Angeles, California 90071-1560
9 Telephone: (213) 683-9100
10 Facsimile: (213) 687-3702

11 DAVID H. FRY (State Bar No. 189276)
12 david.fry@mto.com
13 JESLYN A. MILLER (State Bar No. 274701)
14 jeslyn.miller@mto.com
15 MUNGER, TOLLES & OLSON LLP
16 560 Mission Street
17 Twenty-Seventh Floor
18 San Francisco, California 94105-2907
19 Telephone: (415) 512-4000
20 Facsimile: (415) 512-4077

21 Attorneys for Defendants,
22 WELLS FARGO & COMPANY and
23 WELLS FARGO BANK, N.A.

24 UNITED STATES DISTRICT COURT
25
26 NORTHERN DISTRICT OF CALIFORNIA

27 SHARIAR JABBARI and KAYLEE
28 HEFFELFINGER, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

WELLS FARGO & COMPANY and WELLS
FARGO BANK, N.A.,

Defendants.

Case No. 15-cv-02159-VC

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO COMPEL
ARBITRATION OF PLAINTIFF KAYLEE
HEFFELFINGER'S CLAIMS**

[Declaration of Connie Kotzman and Proposed
Order filed concurrently herewith]

Judge: Hon. Vince Chhabria
Ctrm.: 4
Date: September 10, 2015
Time: 10:00 a.m.

TABLE OF CONTENTS

	Page
STATEMENT OF RELIEF SOUGHT	1
ISSUE TO BE DECIDED	1
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
A. Heffelfinger's January 2012 Accounts.....	2
B. Heffelfinger's March 2012 Accounts.....	2
C. Heffelfinger's October 2012 Accounts and March 2013 Savings Account.....	4
D. Heffelfinger's Online Banking.....	5
III. ARGUMENT	6
A. Heffelfinger Agreed to Arbitration With Wells Fargo.....	6
B. The Dispute is Arbitrable, But the Court Should Not Reach that Question.....	7
1. Interpretation of the Arbitration Agreement Has Been Clearly and Unmistakably Assigned to the Arbitrator.....	7
2. If the Court Were To Reach the Question of Arbitrability, Heffelfinger's Claims Should Be Arbitrated.....	8
C. Heffelfinger Should Be Compelled to Arbitrate on an Individual Basis	10
D. The Case Should Dismissed or Stayed Pending the Outcome of The Arbitration	10
IV. CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Ackerberg v. Citicorp USA, Inc.</i> , 898 F. Supp. 2d 1172 (N.D. Cal. 2012)	7
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	10
<i>AT&T Techs., Inc. v. Commc'ns Workers of Am.</i> , 475 U.S. 643 (1986)	6, 8, 9
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985)	6
<i>Nguyen v. Barnes & Noble Inc.</i> , 763 F.3d 1171 (9th Cir. 2014)	7
<i>Oracle Am., Inc. v. Myriad Grp. A.G.</i> , 724 F.3d 1069 (9th Cir. 2013)	8
<i>Paracor Fin., Inc. v. Gen. Elec. Capital Corp.</i> , 96 F.3d 1151 (9th Cir. 1996)	6
<i>Rent-A-Ctr., W., Inc. v. Jackson</i> , 561 U.S. 63 (2010)	8
<i>Sparling v. Hoffman Constr. Co.</i> , 864 F.2d 635 (9th Cir. 1988)	10
<i>Swift v. Zynga Game Network, Inc.</i> , 805 F. Supp. 2d 904 (N.D. Cal. 2011)	7
<i>Tuminello v. Richards</i> , 504 F. App'x 557 (9th Cir. 2013)	8
<i>United Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960)	9
<i>World Grp. Secs., Inc. v. Allen</i> , No. CV 07-1657-PHX-JAT, 2007 WL 4168572 (D. Ariz. Nov. 20, 2007)	9

STATE CASES

<i>Carroll v. Lee</i> , 148 Ariz. 10 (1986)	6
--	---

TABLE OF AUTHORITIES
(continued)

Page(s)

<i>Nedlloyd Lines B.V. v. Superior Court</i> , 3 Cal. 4th 459 (1992).....	6
<i>Scott Patrick, Inc. v. McMurdie</i> , No. 1 CA-SA 07-0118, 2007 WL 5517488 (Ariz. Ct. App. Aug. 30, 2007)	8
<i>Sovereign Camp, W.O.W. v. Daniel</i> , 48 Ariz. 479 (1936)	6, 7
FEDERAL STATUTES	
9 U.S.C. § 1	2, 4
9 U.S.C. § 3	10
OTHER AUTHORITIES	
9A Ariz. Prac., Business Law Deskbook §35:77 (2014-2015 ed.)	7
RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981)	6
AAA Commercial Arbitration Rules, Rule 7(a).....	8

1 **PLEASE TAKE NOTICE THAT** at 10:00 am on September 10, 2015, or as soon
2 thereafter as the parties may be heard, in Courtroom 4 of the United States District Court for the
3 Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California,
4 Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., will and hereby do move the
5 Court for an order compelling Plaintiff Kaylee Heffelfinger to submit her claims in this action to
6 binding individual arbitration.

7 **STATEMENT OF RELIEF SOUGHT**

8 Wells Fargo seeks an order compelling Heffelfinger to arbitrate her claims on an individual
9 basis, consistent with the terms of her arbitration agreement with Wells Fargo Bank, N.A.

10 **ISSUE TO BE DECIDED**

11 Should Heffelfinger be compelled to resolve her dispute with Wells Fargo Bank in
12 individual arbitration, pursuant to the terms of the arbitration agreement that governed her
13 relationship with the bank?

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 Plaintiff Kaylee Heffelfinger's claims must be submitted to binding arbitration. When
17 Heffelfinger opened her Wells Fargo bank accounts in March 2012, she signed an account
18 application form certifying that she would arbitrate all disputes with the bank—including the
19 claims she makes in this lawsuit. At that time, Heffelfinger also received a Consumer Account
20 Agreement ("CAA"), which provided in its first substantive provision that "you and the Bank
21 agree, at your or the Bank's request, to submit to binding arbitration all claims, disputes, and
22 controversies between or among you and the Bank." Heffelfinger was again informed of her
23 agreement to arbitrate all disputes with Wells Fargo in August 2012, when she enrolled in online
24 banking, and then again in March 2013, when she opened a new savings account. In addition,
25 Heffelfinger's use of Wells Fargo's banking services after being informed of the arbitration
26 agreement constitutes her acceptance, by conduct, of the terms of the agreement.

1 The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, requires enforcing Heffelfinger's
2 agreement to arbitrate her disputes with Wells Fargo.

3 **II. BACKGROUND**

4 **A. Heffelfinger's January 2012 Accounts**

5 Checking (0051) and savings (7957) accounts were opened for Heffelfinger on January 21,
6 2012.¹ Declaration of Connie Kotzman ("Kotzman Decl.") ¶ 13, Ex. 3. Statements were sent to
7 Heffelfinger's home address beginning on January 31, 2012, for account 7957, and February 6,
8 2012, for account 0051. *Id.* Exs. 8-11. Heffelfinger asserts that the signature on the application
9 for these accounts was forged. Consolidated Amended Complaint ("CAC") ¶ 65.² The accounts
10 were closed on February 28, 2012 without incurring bank fees. Kotzman Decl. Ex. 9, 11.

11 **B. Heffelfinger's March 2012 Accounts**

12 On March 16, 2012, Heffelfinger opened two accounts with Wells Fargo Bank, a checking
13 account (4427) and a savings account (6918). CAC ¶ 64; Kotzman Decl. ¶ 16, Ex. 4. Statements
14 were sent to the address provided by Heffelfinger beginning on March 21, 2012, for account 4427,
15 and March 31, 2012, for account 6918. *Id.* Exs. 12-23. Heffelfinger never used savings account
16 6918, and the account was closed on May 31, 2012 with a zero balance. *Id.* Ex. 23. Heffelfinger
17 deposited money into checking account 4427 on April 4, 2012 and proceeded to engage in routine
18 banking transactions, such as ATM withdrawals and debit card purchases. *Id.* Exs. 13-19.

19 In the course of opening these accounts, Heffelfinger signed a "Consumer Account
20 Application" certifying:

21 I have received a copy of the applicable account agreement and privacy
22 brochure and agree to be bound by them . . . **I also agree to the terms of**
23 **the dispute resolution program described in the account agreement**

24 ¹ Heffelfinger's Wells Fargo accounts are referred to here by their last four digits.

25 ² Wells Fargo has submitted the applications for Heffelfinger's various personal accounts together
26 with this motion. Although these are true and correct copies of its business records, Wells Fargo
27 is not by submitting them making any representation as to the genuineness of Heffelfinger's
28 signatures, which she disputes. None of Wells Fargo's arguments is premised on the assertion that
Heffelfinger signed the 0051 and 7957 account application. Wells Fargo *does* assert that
Heffelfinger signed the account applications for account numbers 4427, 6918, and 9417.

1 Under this program our disputes will be decided before one or
2 more neutral persons in an arbitration proceeding and not by a jury
3 trial or a trial before a judge.

4 *Id.* Ex. 4 at 2-3 (emphasis in orig.).

5 Each time a Wells Fargo customer opens a new account, he or she receives a CAA, which
6 provides the terms that govern the account. Kotzman Decl. ¶ 8. The CAA that Heffelfinger
7 received when she opened her March 2012 accounts was dated effective October 15, 2011. *Id.* ¶
8 9, Ex. 1. It was part of a shrink-wrapped package of information that she was given, called a
9 “New Account Kit.” *Id.* ¶ 8.

10 Prominently featured in the CAA is an arbitration provision entitled, “Dispute resolution
11 program: arbitration agreement.” *Id.* Ex. 1 at 4. It states that “[i]f you have a dispute with the
12 Bank, and you are not able to resolve the dispute informally, you and the Bank agree that upon
13 demand by either you or the Bank, the dispute will be resolved through the arbitration process as
14 set forth in this part.” *Id.* “Dispute” is defined as follows:

15 [A]ny unresolved disagreement between you and the Bank. It includes any
16 disagreement relating in any way to services, accounts or matters; to your use
17 of any of the Bank’s banking locations or facilities; or to any means you may
18 use to access your account(s). It includes claims based on broken promises or
19 contracts, torts, or other wrongful actions. It also includes statutory, common
20 law, and equitable claims.

21 *Id.* “Dispute” also includes any “disagreements about the meaning, application or enforceability
22 of this arbitration agreement.” *Id.*; *see also id.* (providing that “[t]he arbitrator shall decide any
23 dispute regarding the enforceability of this arbitration agreement”).

24 The CAA’s arbitration provision states in bold-faced, capital letters that “**YOU AGREE
25 THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR
26 TRIAL BEFORE A JUDGE IN A PUBLIC COURT.**” The provision emphasizes the
27 following provision:

28 **NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO
JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS
IN ANY ARBITRATION, OR TO INCLUDE IN ANY
ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR
MEMBER OF A CLASS.**

Id.

1 Finally, the CAA’s arbitration provision states that arbitrations “shall be administered by
2 the American Arbitration Association (AAA) . . . according to the Commercial Arbitration Rules
3 and the Supplemental Procedures for Consumer Related Disputes” and that the agreement is
4 “governed by the provisions of the Federal Arbitration Act.” *Id.*

5 **C. Heffelfinger’s October 2012 Accounts and March 2013 Savings Account**

6 On October 4, 2012, two additional accounts were opened for Heffelfinger—a checking
7 account (0021) and a savings account (2341)—but no money was deposited in them at first.
8 Kotzman Decl. ¶ 19, Ex. 5. A week later, on October 11, 2012, Heffelfinger overdrew the
9 checking account she had opened in March 2012 (4427) by \$3.85 when she made a purchase of
10 \$35 at a nail salon. She made one additional charge the following day, for \$4.90, and then never
11 used the account again. With the addition of a monthly service fee of \$3, the final negative
12 balance on the account was minus \$11.75. *Id.* Ex. 19 at 2. The account was closed on December
13 11, 2012. At that time, the bank partially offset the negative \$11.75 balance with a transfer of
14 \$6.11 from account 0021. *Id.* Ex. 21.

15 Six days after she used her checking account 4427 for the last time, on October 18, 2012,
16 Heffelfinger deposited \$165.59 into her account 0021. *Id.* Ex. 24 at 2. She made dozens of
17 deposits, ATM withdrawals, and purchases on account 0021 each month through July 2013. *Id.*
18 Exs. 24-33; *see also* CAC ¶ 67 (stating that Heffelfinger stopped actively using her accounts in
19 July 2013). Heffelfinger never used savings account 2341, and the account was closed on
20 December 31, 2012. Kotzman Decl. Ex. 37 at 1.

21 On March 6, 2013, an additional savings account (9417) was opened for Heffelfinger. *Id.*
22 ¶ 20, Ex. 6-7. Heffelfinger signed an account application certifying:

23 **I have received a copy of the applicable account agreement . . . (as each may**
24 **be amended from time to time) and agree to be bound by their terms.** I also
25 agree to the terms of the dispute resolution program described in the foregoing
26 agreements. Under the dispute resolution program, our disputes will be decided
before one or more neutral persons in an arbitration proceeding and not by a jury
trial or a trial before a judge.

27 *Id.* Ex. 6 at 5 (emphasis in orig.).
28

1 Heffelfinger received monthly statements at her home address for checking account 0021
2 beginning on November 2, 2012. *Id.* Exs. 24-36. Her new savings account (9417) was combined
3 in the same monthly statement beginning on April 3, 2013. *Id.* Exs. 29-36. Heffelfinger's last
4 deposit into account 0021 was dated July 10, 2013. *Id.* Ex. 33 at 2. At this time, Heffelfinger had
5 only two open accounts in her name—a checking account (0021), which she had been actively
6 using, and a savings account (9417) with a zero dollar balance. *Id.* at 1. In the month of July,
7 Heffelfinger had several expenditures that left her checking account with a balance of only \$0.42.
8 *Id.* at 2. In her bank statement dated August 2, 2012, she was assessed a \$12 monthly service fee
9 on the checking account because, unlike in prior months, Heffelfinger had not in that month made
10 the ten debit card purchases and payments that were required for Wells Fargo to waive its account
11 service fee. This resulted in a negative balance of \$11.58 on the account. *Id.* at 2. In the
12 following months, Heffelfinger's account was used to make two recurring payments of \$9.99 to
13 Xbox Live, and she was assessed overdraft fees of \$35 for each occurrence. *Id.* Exs. 34, 36. She
14 also incurred an additional \$12 service fee in the statement dated August 30, 2013. *Id.* Ex. 34.
15 When she did not respond to letters concerning the overdrawn status of account 0021, the account
16 was closed on October 3, 2013, with an unpaid balance of \$113.56. Heffelfinger's savings
17 account 9417 was also closed on October 3, 2013 with a zero balance. *Id.* Ex. 36.

18 **D. Heffelfinger's Online Banking**

19 Heffelfinger enrolled in online banking on August 7, 2012. Kotzman Decl. ¶ 11. As a
20 condition to her enrollment, Heffelfinger agreed to the terms of Wells Fargo's Online Account
21 Agreement (the "OAA"). *Id.* ¶ 10, Ex 2. The OAA in effect when Heffelfinger enrolled in online
22 banking provided:

23 By clicking "I Agree" below or using the Service, you are agreeing to the
24 terms of this Agreement. This Agreement includes, among other
25 things . . . your agreement with us to use binding arbitration for most
26 disputes arising under this Agreement or concerning the Service and to
waive the right to a trial by jury; your waiver of class-action rights . . .

27 *Id.* Ex. 2 at 1.
28

1 The OAA's arbitration provision requires arbitration of any dispute concerning Wells
2 Fargo's online services and the "interpretation of this Agreement (including the meaning of this
3 arbitration agreement and whether a disagreement is a 'dispute' subject to binding arbitration as
4 provided for in this arbitration agreement)." *Id.* Ex. 2 at 32. The OAA explains that "[d]isputes
5 arising under any separate agreement governing your other Eligible Accounts will be governed by
6 the dispute resolution and governing law provisions of that agreement, which also take precedence
7 over this section." *Id.* Heffelfinger used online banking services regularly between August 2012
8 and October 2013. *Id.* ¶ 11.

9 **III. ARGUMENT**

10 **A. Heffelfinger Agreed to Arbitration With Wells Fargo.**

11 The FAA "mandates that district courts *shall* direct parties to proceed to arbitration on
12 issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*,
13 470 U.S. 213, 218 (1985). The threshold question for the court to decide is whether the parties
14 entered into an agreement to arbitrate. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475
15 U.S. 643, 649 (1986).

16 A person who signs a contract is bound by its provisions, whether or not he reads them.
17 *See Sovereign Camp, W.O.W. v. Daniel*, 48 Ariz. 479, 487 (1936).³ A person may also assent to a
18 contract through action or inaction. *See, e.g., Carroll v. Lee*, 148 Ariz. 10, 13-14 (1986); *see also*
19 RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981) ("Just as assent may be manifested by
20 words or other conduct, sometimes including silence, so intention to make a promise may be

21
22 ³ The 2011 CAA contains a contractual choice-of-law provision stating: "Your account is
23 governed by the laws and regulations of the United States and, to the extent applicable, the laws of
24 the state in which the office of the Bank that maintains your account is located . . . without regard
25 to conflicts of laws principles." Kotzman Decl. ¶ 9, Ex. 1 at 40. Under this provision, Arizona
26 substantive law applies because Heffelfinger's accounts were opened and maintained by offices in
27 Phoenix, Arizona. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th
28 Cir. 1996) (under California choice-of-law analysis, a choice-of-law clause is binding on the
parties to a contract unless "(1) the chosen state does not have a substantial relationship to either
the parties or the transaction; or (2) application of the chosen state's law would be contrary to a
fundamental policy of a state with a materially greater interest in the particular issue.") (quoting
Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992)).

1 manifested in language or by implication from other circumstances, including course of dealing or
2 usage of trade or course of performance.”).

3 Heffelfinger assented to the arbitration provision contained in the CAA when she opened
4 and used her accounts. She admits that she opened two accounts with Wells Fargo in 2012, *see*
5 CAC ¶ 64, at which time she signed an account application stating that she had received a copy of
6 the CAA and agreeing to be bound by its terms, including “the terms of the dispute resolution
7 program described in the account agreement.” Kotzman Decl. Ex. 4 at 2. Heffelfinger also
8 received a copy of the CAA that included an arbitration clause. *Id.* ¶¶ 8-9, Ex. 1. The CAA in
9 turn provides that “[b]y signing the Bank’s signature card for your account or using your account
10 or service, you will be considered to have received and agreed to this Agreement.” *Id.* Ex. 1 at 1.

11 Thus, Heffelfinger had both actual and constructive notice of the CAA. She agreed to the
12 arbitration provision it contained by signing the consumer account applications and using the
13 accounts. *See Sovereign Camp*, 48 Ariz. at 487; *Ackerberg*, 898 F. Supp. 2d at 1176.

14 Heffelfinger was further informed of her agreement to arbitrate all disputes with the bank
15 in August 2012, when she enrolled in online banking,⁴ and in March 2013, when she signed an
16 additional account application certifying that she agreed to arbitrate disputes with the bank. *See*
17 Kotzman Decl. ¶¶ 10-12, 20, Ex. 2, 6.

18 **B. The Dispute is Arbitrable, But the Court Should Not Reach that Question.**

19 **1. Interpretation of the Arbitration Agreement Has Been Clearly and**
20 **Unmistakably Assigned to the Arbitrator.**

21 The “arbitrability” question—*i.e.*, whether a particular dispute is subject to an agreement to
22 arbitrate—may be decided by either the court or the arbitrator, depending on the parties’

23 ⁴ The OAA is a type of “clickwrap” agreement. “Clickwrap” agreements “have been routinely
24 upheld by circuit and district courts” as enforceable contracts because they put users on notice of
25 the terms to which they are assenting. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171,
26 1175-76 (9th Cir. 2014); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal.
27 2011); 9A Ariz. Prac., Business Law Deskbook § 35:77 (2014-2015 ed.) (noting that “clickwrap
28 agreements have been held to be generally valid and enforceable contracts”). Under the OAA,
Heffelfinger consented to arbitrating all disputes concerning Wells Fargo’s online services and
was expressly informed that her personal accounts were governed by the dispute resolution
provision of the CAA. Kotzman Decl. Ex. 1 at 32-33.

1 agreement. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). If the agreement
2 “clearly and unmistakably” provides that the arbitrator should decide questions of arbitrability,
3 then the court must honor that agreement. *AT&T Tech.*, 475 U.S. at 649.

4 The arbitration agreement here clearly and unmistakably assigns those questions to the
5 arbitrator. The agreement provides that “disputes” will be arbitrated and states that disputes
6 “include disagreements about the meaning, application or enforceability of this arbitration
7 agreement.” Kotzman Decl. Ex. 1 at 4. It further states that “[a] dispute also includes any
8 disagreement about the meaning of this Arbitration Agreement, and whether a disagreement is a
9 ‘dispute’ subject to binding arbitration as provided for in this Arbitration Agreement.” *Id.* The
10 agreement also makes clear that “[t]he arbitrator shall decide any dispute regarding the
11 enforceability of this arbitration agreement.” *Id.*

12 That language could not be more clear. *See Tuminello v. Richards*, 504 F. App’x 557, 558
13 (9th Cir. 2013) (holding that a contract providing that “the arbitrator shall decide ‘any and all
14 controversies . . . concerning any account(s), transaction, dispute or the construction, performance,
15 or breach of this or any other Agreement’ . . . provides clear and unmistakable evidence that the
16 parties intended the question of arbitrability to be decided in arbitration”). Even without it,
17 however, the issue of arbitrability would still be one for the arbitrator because the agreement
18 incorporates the AAA Commercial Arbitration Rules, Rule 7(a) of which provides that the
19 arbitrator shall decide the validity of the arbitration agreement and the arbitrability of any claim.
20 Kotzman Decl. Ex. 1 at 4. *See, e.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074
21 (9th Cir. 2013); *see also Scott Patrick, Inc. v. McMurdie*, No. 1 CA-SA 07-0118, 2007 WL
22 5517488, at *5 (Ariz. Ct. App. Aug. 30, 2007) (same). The Court should therefore compel
23 arbitration, leaving for the arbitrator to decide (to the extent the matter is disputed) whether
24 Heffelfinger’s claims are within the scope of the agreement.

25 **2. If the Court Were To Reach the Question of Arbitrability,**
26 **Heffelfinger’s Claims Should Be Arbitrated.**

27 If the Court were to reach the question whether Heffelfinger’s claims fall within the
28 arbitration agreement, the answer would be that they do.

1 “An order to arbitrate the particular grievance should not be denied unless it may be said
2 with positive assurance that the arbitration clause is not susceptible of an interpretation that covers
3 the asserted dispute.” *AT&T Techs.*, 475 U.S. at 650 (1986) (quoting *United Steelworkers v.*
4 *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). And where the arbitration clause is
5 sufficiently broad, as is the case here, there is a heightened presumption of arbitrability such that
6 “[i]n the absence of any express provision excluding a particular grievance from arbitration, we
7 think only the most forceful evidence of a purpose to exclude the claim from arbitration can
8 prevail.” *Id.*; see also *World Grp. Secs., Inc. v. Allen*, No. CV 07-1657-PHX-JAT, 2007 WL
9 4168572, at *5 (D. Ariz. Nov. 20, 2007) (applying Arizona contract law to find that successor-
10 liability claims fell within the parties’ agreement to arbitrate all disputes concerning the accounts).

11 The CAA states that “[i]f you have a dispute with the Bank, and you are not able to resolve
12 the dispute informally, you and the Bank agree that upon demand by either you or the Bank, the
13 dispute will be resolved through the arbitration process as set forth in this part.” Kotzman Decl.
14 Ex. 1 at 4. It then defines “dispute” as broadly as possible to include any disagreement between
15 the customer and the bank: “A ‘dispute’ is any unresolved disagreement between you and the
16 Bank.” *Id.* The agreement provides examples of things that would come within that expansive
17 scope: “It includes any disagreement relating in any way to services, accounts or matters; to your
18 use of any of the Bank’s banking locations or facilities; or to any means you may use to access
19 your account(s). It includes claims based on broken promises or contracts, torts, or other wrongful
20 actions. It also includes statutory, common law, and equitable claims.” *Id.*

21 Heffelfinger’s claims are, obviously, a disagreement with the bank. Moreover, they
22 concern her accounts. She alleges that Wells Fargo used her personal information to open
23 unauthorized accounts in her name, CAC ¶ 64-66, and persuaded her to open accounts she did not
24 want by representing that she needed two accounts to receive a debit card, CAC ¶ 64. If
25 Heffelfinger is complaining about fees charged to her account, or about her accounts being sent to
26 collections, that is obviously a dispute related to her account. The Amended Complaint
27 specifically seeks restitution on behalf of Heffelfinger. *Id.* at 31. Any amount that Wells Fargo
28

1 might have received from Heffelfinger that could possibly be owed in restitution would have come
2 from money Heffelfinger deposited in her accounts. Heffelfinger also complains of Wells Fargo's
3 business model "built in part on signing its customers up for multiple accounts," *id.* ¶ 25, and
4 alleges that Wells Fargo's bankers use inaccurate or misleading information to induce customers
5 to open additional accounts, *id.* ¶¶ 32, 86(C), bundle services so that unauthorized accounts are
6 opened at the same time as authorized accounts, *id.* ¶ 36, and do not close preexisting accounts in
7 order to get credit for a new "sale," *id.* ¶ 41. On their face, these claims relate to Heffelfinger's
8 accounts.

9 **C. Heffelfinger Should Be Compelled to Arbitrate on an Individual Basis**

10 The CAA's arbitration provision prohibits class arbitration, Kotzman Decl. Ex. 1 at 4, and
11 must be enforced. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-53 (2011).

12 **D. The Case Should Be Dismissed or Stayed Pending the Outcome of The Arbitration**

13 The Court may dismiss the Amended Complaint without prejudice. *Sparling v. Hoffman*
14 *Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). Alternatively, the Court may stay this pending
15 action, including all discovery, until the conclusion of the arbitration. 9 U.S.C. § 3.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Wells Fargo respectfully requests that the Court grant this
18 motion to compel arbitration and dismiss this action or stay it pending completion of the
19 arbitration.

20
21 DATED: August 13, 2015

MUNGER, TOLLES & OLSON LLP

22
23 By: /s/ David H. Fry

24 DAVID H. FRY

25 Attorneys for Defendants,
26 WELLS FARGO & COMPANY and
27 WELLS FARGO BANK, N.A.
28